MENTERI TENAGA, AIR DAN KOMUNIKASI & ANOR A

v.

MALAYSIAN TRADE UNION CONGRESS & ORS

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-01-424-2010]
15 OCTOBER 2012 C

CIVIL PROCEDURE: *Locus standi - Judicial review - Refusal of Minister to make public water concession agreement and related audit report ('documents') - Whether applicants had locus standi to apply - Whether applicants adversely affected by Minister's decision - Whether* D *principle of legitimate expectation and fiduciary relationship between government and citizens arose - Whether documents protected under the Official Secrets Act 1972 - Whether disclosure detrimental to national security or public interest*

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The first respondent ('MTUC') wrote to the first appellant ('the Minister') to furnish the MTUC and also to make public: (i) a concession agreement ('CA') between the Selangor State Government, the second appellant and Syarikat Bekalan Air Selangor Sdn Bhd ('Syabas'); and (ii) the Audit Report 2005 ('the report') which justified granting Syabas a 15% increase in water tariffs. The CA had given Syabas a 30-year concession to supply treated water to Selangor and the Federal Territory. The Minister refused MTUC's requests ('the Minister's decision') on the ground that the report was a secret under the Official Secrets Act 1972 ('OSA') and that the CA was confidential in that cl. 45 of the agreement provided that disclosure of its contents to third parties could only be made if all parties to the CA consented. MTUC and the other respondents applied to the High Court for judicial review of the Minister's decision seeking a declaration that the respondents and/or the public was entitled to have access to the report and the CA as they were public documents. The respondents sought to quash the Minister's decision by *certiorari* and direct him by way of *mandamus* to disclose the contents of the report and the CA. The respondents contended that the Minister's decision was unreasonable, had failed to consider relevant matters, had considered irrelevant matters and had breached art. 8 of the Federal Constitution. They argued that the

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A CA was executed with public interest in mind and that the CA and the report were not detrimental to national security. The High Court granted the respondents' application ruling, *inter alia*, that the respondents had *locus standi* to file the judicial review application as they were paying water consumers living within the B area covered by the concession and were adversely affected by an increase in water tariffs by Syabas. The appellants appealed to the Court of Appeal contending, *inter alia*, that to acquire *locus standi* in public interest litigation in Malaysia, an applicant had to show that his private right had been infringed or that he had suffered C special damage, neither of which conditions the respondents had fulfilled.

Held: (allowing appeal with costs; setting aside decision of High Court)

D **Per Zaleha Zahari JCA (majority):**

(1) The 2nd to the 14th respondents had no *locus standi* to file the application for judicial review. Their dissatisfaction with the Minister's decision did not make them persons "adversely affected" within the ambit of O. 53 of the Rules of the High E Court. They were clearly strangers to the application and the question of them being wrongly deprived of a fundamental or legal right did not arise. The request to the Minister for access to and disclosure of the documents was made by MTUC alone and not by the 2nd to the 14th respondents. The F Minister's reply was accordingly only addressed to the MTUC. (para 22)

(2) The High Court's approach of linking parties to the subject matter based on the English criteria of *locus*, which had G different provisions, was misconceived. The requirement in Malaysia of having to establish a legal right under the law and a breach of such legal right which adversely affected the rights of such a person effectively restricted public interest litigation. (para 21)

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(3) Whilst MTUC might be considered to be "adversely affected" by the Minister's decision, to clothe it with *locus*, it had to establish that it had a fundamental right or a legal right to have access to and disclosure of the Report and the CA and I that those rights had been infringed. The cause of action cited was an alleged right of access to documents that had been

requested for. But there was no federal law that allowed the public to have such an access. The Minister could not therefore be compelled to accede to MTUC's request. His decision was not in breach of any fundamental or legal rights, be it of MTUC or of any of the respondents. (paras 23, 27 & 28)

(4) The Minister's decision not to grant access to the CA was not irrational as it was premised on cl. 45 of the CA which stipulated that disclosure required the consent of all parties to the agreement. With regard to the Report, the powers and duties to declassify documents under the OSA had been given to relevant parties and not to the courts. The court could not usurp the power of the Minister concerned or the public officer charged with the responsibility for such declassification. (paras 35 & 36)

Per Abu Samah Nordin JCA (majority):

(1) The High Court erred in granting the order of *certiorari* to MTUC without determining whether MTUC had any legal right to the CA and the report or that the Minister had acted in breach of MTUC's legal right in denying access to those documents. (para 76)

(2) Sections 44 and 45 of the Specific Relief Act 1950 had not been complied with, meaning the grant of the order of *mandamus* was bad in law and made without any clear legal basis. There was no finding by the High Court that MTUC's right had been infringed by reason of the Minister's decision in rejecting its application. (para 78)

(3) The contention that the CA and the Report were not detrimental to national security or public interest was irrelevant in determining whether or not they were classified as official secrets. The respondents' assertion that they had a legitimate expectation to those documents could not be sustained to defeat an express provision in the OSA which prohibited wrongful or unauthorised communication of any official secret. (para 84)

A **Per Hishamudin Mohd Yunus JCA (dissenting):**

(1) The respondents were adversely affected by the Minister's decision. The Minister never took the position that MTUC had no right to have sight of the two documents sought, or
B that he was under no duty to make public disclosure of the documents. He merely took the position that he could not disclose the documents by reason of their 'confidential' status. (paras 115 & 121)

C **(2)** The report was not protected by the OSA. There was no evidence that prior to it being produced before the Cabinet, the report had been classified as official secret under the OSA. The report was also not legally a Cabinet document as it existed before the Cabinet meeting, independent of any
D Cabinet paper. There was no affidavit evidence to state that disclosure of the report would be detrimental to national security or public interest. (paras 123, 128 & 130)

(3) The Minister's reliance on cl. 45 of the CA could not be a basis for his refusal to disclose the CA as both the Selangor
E government and Syabas were prepared to disclose the CA to the respondents. In any case the appellant's claim to confidentiality had to be examined with reference to public interest. The appellants had never suggested that disclosure of the CA would be detrimental to public interest. The High
F Court after examining the CA had also held that it contained no information detrimental to national security or public interest. (paras 147 & 150)

(4) The Minister was under a legal duty to make disclosure. That
G duty arose out of the fiduciary relationship between the government and the citizens particularly when it was considered that access to treated water was a basic necessity of life and a basic human right; that Syabas enjoyed a monopolistic position in relation to consumers of treated water
H in Selangor; and that under s. 3(1) of the Water Services Industry Act 2006, the Federal Government had executive authority over all matters relating to water supply systems and services. In the context of that relationship, the Minister had publicly assured that the government would be strict and
I transparent in considering any application by Syabas to increase the tariff and that the views of various stakeholders including consumers would be taken into account. (para 159)

(5) By reason of the public assurances made by the Minister, a duty arose on the part of the appellants to make disclosure to the respondents on the principle of legitimate expectation. (para 161)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama ('MTUC') telah menulis kepada perayu pertama ('Menteri') supaya membekalkan kepadanya dan mendedahkan kepada orang ramai: (i) perjanjian konsesi ('CA') di antara perayu kedua, Kerajaan Negeri Selangor, dengan Syarikat Bekalan Air Selangor Sdn Bhd ('Syabas'); dan (ii) Laporan Odit 2005 ('Laporan') yang mewajarkan pembenaran kenaikan 15% tarif air kepada Syabas. CA telah memberi konsesi selama 30 tahun kepada Syabas untuk membekalkan air bersih kepada Selangor dan Wilayah Persekutuan. Menteri enggan melayan permintaan MTUC ('keputusan Menteri') atas alasan bahawa Laporan adalah dokumen rahsia di bawah Akta Rahsia Rasmi 1972 ('OSA') dan bahawa CA juga adalah rahsia kerana fasal 45 CA memperuntukkan bahawa pendedahan kandungan kepada pihak ketiga hanya boleh dibuat dengan persetujuan semua pihak kepada CA. MTUC dan responden-responden lain memohon kepada Mahkamah Tinggi untuk mengkaji semula keputusan Menteri sekaligus untuk deklarasi bahawa responden-responden ataupun orang awam berhak untuk melihat Laporan dan CA kerana kedua-duanya adalah dokumen awam dan bukan maklumat rahsia. Responden-responden memohon untuk mengakas keputusan Menteri melalui *certiorari* dan mengarahkan Menteri supaya mendedahkan kandungan Laporan dan CA melalui perintah *mandamus*. Responden-responden mengatakan bahawa keputusan Menteri adalah tidak munasabah, gagal mengambilkira faktor-faktor relevan, telah mengambilkira hal-hal yang tidak relevan dan melanggari fasal 8 Perlembagaan Persekutuan. Mereka berhujah bahawa CA telah dimeterai untuk kemaslahatan awam dan bahawa CA dan Laporan tidak memudaratkan keselamatan negara. Mahkamah Tinggi membenarkan permohonan responden-responden dengan memutuskan, antara lain, bahawa responden-responden mempunyai *locus standi* untuk memfail permohonan semakan kehakiman memandangkan mereka adalah pengguna air berbayar yang tinggal di kawasan yang dirangkumi oleh konsesi dan terjejas secara langsung oleh kenaikan tarif air Syabas. Perayu-perayu merayu ke Mahkamah Rayuan dan berhujah, antara lain, bahawa untuk memperoleh *locus standi* dalam litigasi berkepentingan awam di

A Malaysia, seseorang pemohon mestilah menunjukkan bahawa hak peribadinya telah dilanggari atau telah mengalami kerugian khas. Menurut perayu-perayu, kedua-dua syarat ini gagal dibuktikan oleh responden-responden.

B **Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)**
Oleh Zaleha Zahari HMR (majoriti):

(1) Responden-responden 2 hingga 14 tidak mempunyai *locus standi* untuk memfail permohonan semakan kehakiman. Ketidakpuasan mereka terhadap keputusan Menteri tidak menjadikan mereka "orang yang terkilan" dalam maksud A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Mereka adalah orang asing kepada permohonan dan persoalan sama ada mereka telah dinafikan hak asasi atau hak undang-undang tidak berbangkit. Juga, permohonan kepada Menteri untuk melihat dokumen dan supaya dokumen didedahkan hanya dibuat oleh MTUC sahaja dan tidak oleh responden-responden 2 hingga 14, dan oleh itu, jawapan Menteri hanya ditujukan kepada MTUC.

(2) Pendekatan Mahkamah Tinggi mengaitkan pihak-pihak kepada halperkara berdasarkan kriteria *locus* undang-undang Inggeris, yang mempunyai peruntukan yang berbeza, adalah khilaf. Di Malaysia, peruntukannya mengkehendaki supaya hak di sisi undang-undang dan pelanggarannya yang menjejaskan hak seseorang individu dibuktikan terlebih dahulu, dan ini sekaligus telah menyempitkan ruang litigasi bagi kes-kes berkepentingan awam.

(3) Sementara MTUC boleh dianggap sebagai "telah terkilan" oleh keputusan Menteri, untuk memperoleh *locus* ia mesti membuktikan bahawa ia mempunyai hak asasi atau suatu hak di sisi undang-undang untuk melihat Laporan dan CA, atau untuk dokumen-dokumen tersebut didedahkan, dan bahawa haknya itu telah dilanggari. Kausa tindakan yang tercatit adalah suatu dakwaan wujudnya hak di sisi undang-undang untuk melihat dokumen-dokumen yang diminta. Namun, tidak ada undang-undang persekutuan yang membenarkan orang awam mendapat akses sedemikian. Menteri dengan itu tidak boleh dipaksa untuk melayan permintaan MTUC. Keputusan Menteri tidak melanggari mana-mana hak asasi, sama ada hak asasi MTUC ataupun responden-responden.

(4) Keputusan Menteri tidak membenarkan akses kepada CA bukan sesuatu yang tidak rasional kerana ianya berdasarkan kepada fasal 45 CA yang memperuntukkan bahawa pendedahan memerlukan persetujuan kesemua pihak kepada perjanjian. Berhubung dengan Laporan, kuasa dan tanggungjawab untuk membatalkan kerahsiaan dokumen di bawah OSA telah diberikan kepada pihak-pihak tertentu dan tidak kepada mahkamah. Mahkamah tidak boleh merampas kuasa Menteri atau pegawai awam yang berkaitan.

Oleh Abu Samah Nordin HMR (majoriti):

(1) Mahkamah Tinggi khilaf dalam membenarkan perintah *certiorari* kepada MTUC tanpa menentukan sama ada MTUC mempunyai hak ke atas CA dan Laporan di sisi undang-undang, atau bahawa Menteri telah bertindak secara melanggar hak undang-undang MTUC, apabila menolak akses kepada dokumen-dokumen tersebut.

(2) Seksyen 44 hingga 45 Akta Relif Spesifik 1950 telah tidak dipatuhi, yang bermakna pemberian perintah *mandamus* adalah tak sah dan dibuat tanpa asas undang-undang yang jelas. Tiada dapatan dibuat oleh Mahkamah Tinggi bahawa hak MTUC telah dilanggari oleh Menteri apabila menolak permohonannya.

(3) Hujah bahawa CA dan Laporan tidak menjejaskan keselamatan negara atau kepentingan awam adalah tidak relevan dalam menentukan sama ada atau tidak ianya termasuk sebagai rahsia rasmi. Pengataan responden-responden bahawa mereka mempunyai harapan munasabah kepada dokumen-dokumen tidak boleh diterima bagi mengalahkan peruntukan ekspres dalam OSA yang melarang pendedahan rahsia-rahsia rasmi secara salah atau tanpa izin.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Responden-responden telah terjejas oleh keputusan Menteri. Menteri tidak pernah mengambil pendirian bahawa MTUC tidak mempunyai hak untuk melihat kedua-dua dokumen, atau bahawa beliau tidak berkewajipan untuk mendedahkan dokumen-dokumen kepada orang awam. Menteri hanya berpendirian bahawa beliau tidak boleh mendedahkan dokumen-dokumen disebabkan status "kerahsiaan" mereka.

(2) Laporan Odit tidak dilindungi oleh OSA. Tiada keterangan bahawa sebelum ianya dikemukakan kepada Kabinet, laporan telah dikelaskan sebagai rahsia rasmi di bawah OSA. Laporan juga bukan suatu dokumen Kabinet di sisi undang-undang kerana ia wujud sebelum mesyuarat Kabinet, dan terasing dari kertas Kabinet lain. Tiada keterangan afidavit dikemukakan bagi menyatakan bahawa pendedahan Laporan Odit adalah memudaratkan keselamatan nasional atau kepentingan awam.

(3) Kebergantungan Menteri kepada fasal 45 CA tidak boleh menjadi asas bagi keengganan beliau mendedahkan CA kerana kedua-dua Kerajaan Selangor dan Syabas bersedia untuk mendedahkan CA kepada responden-responden. Apapun, hujah kerahsiaan perayu-perayu harus diteliti dengan merujuk kepada kepentingan awam. Perayu-perayu tidak pernah mengusulkan bahawa pendedahan CA akan menjejaskan kepentingan awam. Mahkamah Tinggi selepas memeriksa CA telah juga memutuskan bahawa ia tidak mengandungi maklumat yang boleh menjejaskan keselamatan negara atau kepentingan awam.

(4) Menteri mempunyai tanggungjawab di sisi undang-undang untuk membuat pendedahan. Tanggungjawab tersebut berbangkit dari perhubungan fidusiari antara kerajaan dan rakyat, terutama apabila diambilkira bahawa akses kepada air bersih merupakan suatu keperluan asas hidup dan hak asasi; bahawa Syabas menikmati monopoli berhubung penggunaan air bersih di Selangor; dan bahawa di bawah s. 3(1) Akta Perkhidmatan Industri Air 2006, Kerajaan Persekutuan mempunyai kuasa ke atas semua perkara berkaitan sistem pembekalan dan perkhidmatan air. Dalam konteks perhubungan sedemikian, Menteri telah pun memberi jaminan bahawa kerajaan akan bersikap tegas dan telus dalam menimbang sebarang permohonan oleh Syabas untuk menaikkan tarif dan bahawa pandangan beberapa pemegang stake termasuk pengguna-pengguna akan diberi perhatian.

(5) Berdasarkan jaminan umum yang dibuat oleh Menteri, suatu tanggungjawab telah berbangkit di pihak perayu-perayu untuk membuat pendedahan kepada responden-responden berasaskan prinsip harapan sah.

Case(s) referred to:

Dzulkifli Abdul Hamid v. PP [1980] 1 LNS 91 FC ***(refd)***

Food Corpn Of India v. Kamdhenu Cattle Feed Industries [1993] AIR SC 1601 ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 ***(refd)***

Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***

K Anandaraj Krishnasamy v. Dato' Dr Vijayasingam & Anor [2005] 4 CLJ 86 HC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Mak Sik Kwong v. Minister of Home Affairs, Malaysia [1975] 2 MLJ 68 ***(refd)***

O'reilly & Ors v. Mackman & Ors [1983] 2 AC 237 ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. Electricity Commissioners Exp London Electricity Joint Committee Co [1920] Ltd [1924] 1 KB 171 ***(refd)***

R v. Monopolies and Mergers Commission, Exp Argyll Group Plc [1986] 1 WLR 763 ***(refd)***

R v. Stafford JJ, Exp Stafford Corp [1940] 2 KB 33 ***(refd)***

R v. Thames Magistrates' Court, Exp Greenbaum [1957] 55 LGR 129 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Rex v. Northumberland Compensation Appeal Tribunal Exparte Shaw [1967] 2 All ER 986 CA, [1969] 1 All ER 208 HL ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

See Kok Kol v. Chong Kui Seng & Ors & Another Appeal [2010] 2 CLJ 481 CA ***(refd)***

Shri Dinesh Trivedi, MP & Ors v. Union of India & Ors [1997] 4 SCC 306 ***(refd)***

South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1980] 1 LNS 71 PC ***(refd)***

Takong Tabari (Suing In Her Personal Capacity And As The Administratrix Of The Estate Of Jeffrey Satuk Gabar-Deceased) v. Government of Sarawak & Ors [1995] 1 CLJ 403 FC ***(refd)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

The Commonwealth of Australia v. John Fairfax & Sons Ltd [1980] 147 CLR 39 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25
Federal Constitution, art. 8
Interpretation Acts 1948 and 1967, s. 17A
Official Secrets Act 1972, ss. 2(1), 2A, 2B, 2C, 8, 16A
Rules of the High Court 1980, O. 53 rr. 1, 2(4), 3
Specific Relief Act 1950, ss. 44, 45
Water Services Industry Act 2006, s. 3(1)

Supreme Court Rules 1977 [UK], O. 53 r. 3(5), (7)

Other source(s) referred to:
De Smith's, Judicial Review, 6th edn, p 792

For the appellants - Datin Azizah Hj Nawawi; SFC
For the respondents - Malik Imtiaz Sarwar (Jenine Gill, Aliff Benjamin Suhaimi & Ang Hean Leng with him); M/s Thomas Philip

[Editor's note: For the High Court judgment, please see Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Ors [2010] 6 CLJ 291.]

Reported by Ashok Kumar

JUDGMENT

Zaleha Zahari JCA:

[1] This appeal was allowed by a majority with my brother, Mohd Hishamudin Haji Mohd Yunus, JCA, dissenting. My reasons in allowing this appeal are as follows.

[2] At the outset it is pertinent to state that the Government of Selangor (the 2nd respondent in the High Court), has been wrongly named a party to this appeal as the 2nd respondent did not object to the application in the High Court and did not participate in the proceedings culminating in the decision which is the subject of this appeal.

Background

[3] What transpired may be shortly stated. The Malaysian Trade Union Congress ("MTUC"), a society of trade unions (the 1st applicant in the High Court/1st respondent in this appeal), had *vide* letter dated 7 November 2006 to the Minister of Energy, Water and Communications, (the 1st respondent in the High

Court/the 1st appellant in this appeal, subsequently referred to as "the Minister") requested the Minister to publicise/make public the agreement executed between the Government of Selangor, Government of Malaysia and Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS") dated 15 December 2004 ("the Concession Agreement") as well an Audit Report.

[4] By another letter dated 23 November 2006 (exh. "RJ16") MTUC made another request to the Minister, this time to furnish to them a copy of the Audit Report and the Concession Agreement.

[5] The Minister responded to MTUC's requests in terms of letter dated 23 November 2006 (exh. "RJ17") which, *inter alia*, states as follows:

> Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai "SULIT" dan "RAHSIA" Kerajaan.

[6] MTUC and 13 others (the 2nd to 14th applicants in the High Court/2nd to 14th respondents in this appeal) then, on 15 January 2007, filed an application for judicial review for the following reliefs:

(a) a declaration that applicants and/or general public have a right to have access to the Audit Report and the Concession Agreement;

(b) alternatively, a declaration that the Audit Report and the Concession Agreement are public documents and not Official Secret documents;

(c) an order of *certiorari* to quash the decision of the appellants denying the applicants access to the Audit Report and the Concession Agreement;

(d) an order of *mandamus* directing the Minister to disclose the contents of the Audit Report and the Concession Agreement to the applicants and/or the general public.

[7] In paras. 3 and 4 of the statement filed pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ("the rules"), the applicants' advanced the following reasons to support their application. The applicants contended that the decision of the Minister denying them access to the documents in issue was unreasonable; that the Minister had failed to consider relevant considerations and considered irrelevant considerations. According to the applicants there was a breach of art. 8 of Federal Constitution which required the Minister to act reasonably and in failing to give reasons for his decision contrary to the applicants legitimate expectation that the Minister would act in a responsible manner.

[8] In opposing the application on behalf of the Minister and the Government of Malaysia (the 3rd respondent in the High Court/2nd appellant in this appeal), paras. 5 and 7 of the affidavit affirmed by Japar bin Abu on 18 January 2008 states as follows:

> 5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat "SULIT" berasaskan klausa 45 Perjanjian Konsesi di mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada perjanjian tersebut.
>
> 6. ...
>
> 7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai "RAHSIA" kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat "Rahsia" di bawah Jadual kepada seksyen 2A Akta Rahsia Resmi, 1972.

[9] On 28 June 2010 the learned Judicial Commissioner High Court Kuala Lumpur granted an order-in-terms of all of the prayers prayed for by the applicants in the judicial review application together with costs. Hence this appeal.

The Appeal

[10] The appellants have advanced five grounds as to why the decision of the learned Judicial Commissioner should be set aside which are as follows: (a) erred in concluding that the applicants had *locus standi* to commence the judicial review application; (b)

erred in failing to find that the Audit Report was an official secret document protected by s. 2A of the Official Secrets Act, 1972; (c) erred in holding that the Minister had failed to take into consideration the legitimate expectation of the applicants; (d) erred in failing to take into account the express provision of the Concession Agreement that it must remain confidential; (e) erred in finding that the documents contained no information that was detrimental to public interest or national security.

[11] The arguments before us was focused on two issues: firstly, *locus standi* of the applicants in file this application for judicial review; secondly, whether the application for the declaratory orders, *certiorari* and *mandamus* sought had been rightly granted.

The Law

[12] The legal provisions referred to in arguments before us are these. Section 25 read with para. 1 of the schedule to the Courts of Judicature Act 1964 is the empowering provision enabling the High Courts to grant orders of *certiorari*, declaration and *mandamus*. The power of the High Court can be exercised for a twofold purpose, namely; the enforcement of fundamental rights, and the enforcement of non-fundamental or ordinary rights (for any other purpose). Paragraph 1 of schedule states as follows:

> 1. Prerogative writs
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any orders, for the enforcement of the rights conferred by Part 11 of the Constitution, or for any of them, or for any purpose.

[13] On the court's power to issue an order of *mandamus* s. 44 of the Specific Relief Act 1950 provides as follows:

> 44 (1) A judge may make an order requiring any specific act to be done ... by any person holding a public office ...:
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

A (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

B (c) in the opinion of the judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

C (e) the remedy given by the order applied for will be complete.

[14] Order 53 r. 1 of the rules prescribes the procedure to be followed in an application for judicial review and provides as follows:

D **1 Scope (O. 53 r. 1)**

(1) This order shall govern all applications seeking the relief specified in para. 1 to the Courts of Judicature Act 1964 and for the purposes therein specified.

E (2) This order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

[15] Order 53 r. 2(4) then provides:

(4) Any person who is adversely affected by the decision of any F public authority shall be entitled to make the application.

[16] The learned Judicial Commissioner's ruling that the applicants had *locus standi* to file this application for judicial review was grounded on the following: each and every applicant is a paying water consumer; had a real and genuine interest in the G subject matter and would be adversely affected by an increase in water tariffs. According to the learned Judicial Commissioner this nexus sufficed to clothe them with *locus* to challenge the decision of the Minister. Her judgment on this issue states as follows:

H [13] From the above statements, I agree with learned counsel for the applicants' contention that the applicants are persons "adversely affected" and not "busy bodies, cranks and other mischief makers" by the decision of the 1st respondent. Each and every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in I monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more

money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the 1st respondent's. I therefore hold the applicants have established they had a *locus standi* to bring this action.

[17] The Senior Federal Counsel (SFC) in her submissions had drawn our attention to the fact that in respect of public interest litigation the position in Malaysia was different from that in England as the SCR 1977 (England) is differently worded from that of the Malaysian provisions. This distinction was recognized by the Malaysian Supreme Court in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 at p. 82/a, where Abdul Hamid CJ (as His Lordship then was) said:

The term "sufficient interest" in the new English O. 53, r. 3(7) -which incidentally has no counterpart in our Rules of the High Court was sufficiently flexible to express a requirement which can vary as the relationship between the subject matter, the remedy sought and the applicant varies.

[18] At p. 82, His Lordship continued:

It is important to note, as I have earlier observed that O. 53 r. 3(7) introduced a common standing test namely that of "sufficient interest".

It has been said that the modem approach to standing in England under the new O. 53 can be summarised thus; provided that the applicant has an arguable case he will probably be given leave to apply for judicial review. At the full hearing, if he has a meritorious claim, the court will strive to accord *locus standi* so long as he is not a mere busybody with no legitimate complaint; see RJF. Gordon on *Judicial Review Law and Procedure* - para. 4-07 p. 51.

...

But in Malaysia there is no provision in our Rules of the High Court equivalent to O. 53 r. 3(7) of the English Rules of the Supreme Court. Thus, in my view, there shall be stringent requirement that the applicant, to acquire *locus standi*, has to

establish infringement of a private right or the suffering of special damage: see *Gouriet v. Union of Post Office Workers, supra,* and also *Boyee*'s case (13) and this, I consider, to be the relevant test to apply when determining the question of standing.

[19] Justice Hashim Yeop Sani on this issue at p. 88/d said:

> It can hardly be disputed that there is no single authoritative definition of an aggrieved person but in general it can be said that a person "aggrieved" is not merely one who is dissatisfied with some act or decision but one who has been wrongly deprived of or has been refused something to which he is legally entitled. Any person can come to court for the protection or enforcement of his rights.

[20] On the facts of this case the request to the Minister for access and disclosure of the documents in issue and be furnished with a copy of the same was made by MTUC. The 2nd to 14th applicant did not make such an application to the Minister. The Minister's reply was accordingly only addressed to the body that made the application to him, ie, MTUC.

[21] Applying the principle enunciated by the Supreme Court decision in *Lim Kit Siang*, I am of the view that the learned Judicial Commissioner's approach of linking parties to the subject matter based on the English criteria of *locus*, which has different provisions, was misconceived. The requirement in Malaysia of having to establish a legal right under the law, a breach of such legal right which adversely affected the rights of such a person, effectively restricts public interest litigation.

[22] In respect of the 2nd to 14th applicants I am of the view that these applicants had no *locus standi* under O. 53 of the rules to file an application for judicial review. These applicants dissatisfaction with the decision of the Minister in rejecting MTUC's application does not make them persons who were "adversely affected" by the Minister's decision falling within the ambit of O. 53. They were clearly strangers to the said application. The question of the 2nd to 14th applicants being wrongly deprived of a fundamental or legal right does not accordingly arise. On this ground alone I am of the view that the application of the 2nd to 14th applicants should have been dismissed.

[23] Whilst MTUC may be considered to fall within the term "adversely affected" by reason of the Minister's refusal of their application, according to the law, to clothe them with *locus*, MTUC must establish that they have a fundamental right or a legal right (see *Lim Kit Siang*'s case) to have access and disclosure of the Audit Report and the Concession Agreement and that those rights had been infringed.

[24] The cause of action here is not a case of denial of access to water, but an alleged right of access to documents that had been requested for. The applicants' interest clearly was in the tariffs to be imposed in respect of water supplied. This has been dealt with in paras. 69 and 70 of my brother, Abu Samah Nordin's, JCA's judgment.

[25] Our attention has also been drawn to the fact that in Malaysia there is no law equivalent to the Australian Freedom of Information Act 1982 passed at the federal level applicable to all "ministers, departments and public authorities". Members of the public have certain rights of access including the right to access documents relating to the operation of government departments and documents that are in the possession of government Ministers or agencies. In India, the Right to Information Act 2005 gives citizens access to the records of the Central and State governments. Citizens in India may request for information from a public authority, which must in turn reply within 30 days. The Indian Act applies to all States and Union Territories of India, except the State of Jammu and Kashmir - which is covered under a State-level law.

[26] In Malaysia, the SFC made reference to the preamble to the Freedom of Information (State of Selangor) Bill 2010 an Enactment to "enhance disclosure of information for the public interest, to provide to every individual an opportunity to access to information made by every department of the State". Section 5 of the Bill reads:

> **Access to information**
>
> 5 (1) Any person may be given access to information made by every department.
>
> (2) If the information sought to be accessed by any person is contained in a document disclosure of which is subject to any written law, access to such information shall be subject to such written law.

[27] There is however no such federal law which allows the public to have such an access.

[28] In this situation I am of the view that the Minister cannot therefore be compelled to accede to the request made by MTUC. His decision was clearly not in breach of any fundamental right or the legal rights, be it of MTUC, or of any of the applicants, when he refused MTUC's request for access to the documents in issue.

[29] In respect of the application an order for *mandamus*, Sharma J in *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56 held that the prerequisites for such an order are:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

(c) whether such duty of an imperative ministerial character involving no judgment or discretion on the part of the respondent;

(d) whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him (eg, an appeal)

[30] The appellants' case was that the Audit Report was a scheduled document under Official Secrets Act 1972 [Act 88] and classified as official secret which cannot be divulged to the public. The Official Secrets Act 1972 deals with the prevention of unauthorised disclosure of official secrets and created offences for any such infringement.

[31] The term "official secret" as defined by s. 2 of the Act 88 as follows:

> "official secret" means any document specified in the schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B

[32] The documents specified in the schedule are:

> Cabinet documents, records of decisions and deliberations including those of cabinet committees;

State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;

Documents concerning national security, defence and international relations.

[33] These documents can only be disclosed if they had been declassified under s. 2C of the Act which, states as follows:

2C. A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service ... may, at any time, declassify any document specified in the schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.

[34] The well-established principles expounded by the Court of Appeal in *See Kok Kol v. Chong Kui Seng & Ors & Another Appeal* [2010] 2 CLJ 481 where Low Hop Bing JCA referred to *Dzulkifli Abdul Hamid v. PP* [1980] 1 LNS 91 where LP Salleh Abbas said in:

It if the originator or the owner of the document treats it and the information contained in it as an official secret and clearly marks it and keeps it as such, it is not open to anyone to regard it as otherwise; and the law must give protection to such document or information even though it contains information generally known to the public.

[35] The powers and the duties to declassify the documents under Act 88 have been given to the relevant parties, not to the courts. The court should not usurp the power of the Minister concerned or public officer charged with the responsibility of such declassification.

[36] On the facts of this case, the Minister's decision not to grant access to the Concession Agreement was not irrational as it was premised on cl. 45 of the Concession Agreement. The Minister had acted within the parameters of the Concession Agreement when he refused MTUC's application for access to the Concession Agreement as the disclosure requires consent by all parties to the agreement.

[37] It would appear that the learned Judicial Commissioner had approached the judicial application on the premise of discovery of documents instead of reviewing the decision of the Minister. The courts have consistently held that in the absence of any pending

A actions against any defendant in court, the plaintiffs are not entitled for an order for pre-action discovery. See *K Anandaraj Krishnasamy v. Dato' Dr Vijayasingam & Anor* [2005] 4 CLJ 86.

Conclusion

B **[38]** To conclude, it is my finding that the learned Judicial Commissioner erred in arriving at the decision which she did, in making a declaratory order that the applicants and/or the general public have a right to have access to Audit Report and Concession Agreement; in quashing the Minister's decision and in C issuing an order of *mandamus* directing the Minister to disclose the contents of the Audit Report and Concession Agreement to the applicants and/or the general public.

[39] I accordingly allowed the appeal with costs and set aside D the decision of the learned Judicial Commissioner.

Abu Samah Nordin JCA:

[40] This is an appeal by the 1st and 2nd appellants who are dissatisfied with the decision of the learned Judicial Commissioner E ('JC') in granting the respondents' application for judicial review under O. 53 of the Rules of High Court 1980 ('RHC') for the following reliefs:

F (i) a declaration that the respondents and/or the public are entitled to access the Concession Agreement dated 15 December 2004 between Syarikat Bekalan Air Selangor Sdn Bhd ('Syabas'), the State Government of Selangor and the Government of Malaysia, and the Audit Report 2005 relating thereto;

G (ii) an order of *certiorari* revoking the decision of the 1st appellant not to publish and/or disclose the Concession Agreement and the said Audit Report to the respondents; and

H (iii) an order of *mandamus* that the 1st appellant publish and/or disclose the Concession Agreement and the said Audit Report and their contents to the respondents and/or the public.

Leave to apply for judicial review was granted on 14 June 2007.

I **[41]** The 1st respondent ("MTUC") filed its application for judicial review after the 1st appellant ("the Minister") turned down its request by a letter dated 7 November 2006 to publish the

Concession Agreement together with the Audit Report for public knowledge and to allow it to have access to the said agreement and the Audit Report. The reason given by the Minister in a letter dated 4 December 2006 for rejecting the respondents' request is that the Concession Agreement and the Audit Report are 'SULIT' dan 'RAHSIA' ('Confidential and Secret').

[42] By this Concession Agreement, Syabas had been given a 30 year concession to supply treated water to the state of Selangor and Federal Territory according to the water tariffs as provided therein. It is the respondents' contention and belief, based on newspaper reports, that the second appellant ("the government") is expected to approve Syabas's application for an increase of water tariffs by 15% from January 2006, following an Audit Report that Syabas had met the performance target in reducing non-revenue water (NRW) that is lost through leakage. The agreement also contains a compensation clause in which the State Government of Selangor will have to pay compensation to Syabas in the event that Syabas is not allowed to raise water tariffs in accordance with the terms of the agreement. The respondents claim that the Minister had, sometime in October 2006 announced that Syabas had met the performance target and thus eligible for a 15% increase in the water tariffs. The Minister did not deny making the said announcement. In fact, in reply to the MTUC's letter, the Minister confirmed that Syabas had met the performance target and therefore eligible to get an increase in the water tariffs with effect from 1 November 2006.

[43] Learned counsel for the respondents submitted before us that the basis of the respondents' application for the declaration and the orders of *certiorari* and *mandamus* is that the government, as a fiduciary, has a responsibility to provide safe and affordable treated water and to ensure that unreasonable profiteering does not occur from the privatisation of supply and distribution of treated water; water being an inalienable and basic right to human existence and living. The respondents contend that they had a legitimate expectation that the government shall at all times ensure that they and the people of the Malaysia has access to safe drinking water.

[44] It is the respondents' contention and belief that the Audit Report is significant as it provides the basis for the increase in the water tariffs.

[45] The learned Judicial Commissioner ("JC") granted all the reliefs sought by the respondents on the ground, *inter alia* that,

> that the applicants are persons "adversely affected" and not "busy bodies, cranks and other mischief makers" with the decision of the 1st respondent. Each and every applicant is a paying water consumer within the area covered by the concession agreement. With SYABAS now in monopoly over the distribution of treated water in the concession area, the applicants do not have an alternative access to treated water. If the water tariff is increased and they have to pay more money for water, they have no real choice to refuse to pay because there is no alternative supplier of water available. In addition thereto, water being essential for life is part of a constitutional right which can be implied under the Federal Constitution. On the facts and circumstances of this case, it is obvious that the applicants had a real and genuine interest in the subject matter. They are adversely affected by the increase in water tariff and in this regard there is a direct nexus with the decision of the 1st respondent's. I, therefore hold the applicants have established they had a *locus standi* to bring this action.

[46] The other grounds given by the learned JC in allowing the application for judicial review are:

(i) the Concession Agreement was executed with public interest in mind and it is only fair that it be made public;

(ii) the Concession Agreement and the Audit Report are not detrimental to national security;

(iii) it is nonsensical to say that any document put before the cabinet is automatically treated as 'RAHSIA' under s. 2A of the Official Secrets Act 1972.

[47] The appellants' appeal against the decision of the learned JC is based on two grounds. Firstly, the learned JC erred in fact and in law in holding that the respondents had *locus standi* to apply for judicial review. Secondly, the learned JC erred in law and in fact in granting the declaration, *certiorari* and *mandamus* to the respondents.

[48] The learned Senior Federal Counsel ('SFC') for the appellants contended that the respondents had no standing to seek the declaration and the orders of *certiorari* and *mandamus* as they were not 'adversely affected' by the decision of the Minister. An applicant for judicial review against the decision of any public

authority must first show that he is a person who is adversely affected by the said decision before he is entitled to make the application.

[49] This is expressly stated in O. 53 r. 2(4) of the RHC which provide:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[50] The test of threshold *locus standi* in our courts is that as stated by the Federal Court in *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 and the Supreme Court (as it then was) in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63. Abdoolcader J, in delivering the judgment of the Federal Court in the case of *Tan Sri Othman Saat* said (p. 179):

> The sensible approach in the matter of *locus standi* in ... declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared even though he could get no other relief, should suffice.

[51] Salleh Abas LP in *Lim Kit Siang*'s case reaffirmed the test as stated in *Tan Sri Othman Saat*'s case and stressed that there was no justification therefore for our courts to depart from the rule of *locus standi* accepted by the highest court in England prior to amendment of the current O. 53 r. 3(7) of the English Supreme Court Rules 1977.

[52] Abdul Hamid CJ (Malaysia) in the same case pointed out that the threshold test of *locus standi* under O. 53 r. 2(4) of the RHC is more stringent than that under O. 53 r. 3(7) of the English Rules of the Supreme Court:

> Thus, in my view, there shall be a stringent requirement that the applicant, to acquire *locus standi*, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v. Union of Post Office Workers*, and also *Boyce's* case and I consider this to be the relevant test to apply when determining the question of standing.

A **[53]** By contrast O. 53 r. 3(7) of the SCR 1977 provides:

> (7) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

B Thus, an applicant for judicial review under the English rules needs only to show that he has a 'sufficient interest' in the matter to which the application relates.

[54] The learned SFC conceded before us that MTUC had
C threshold *locus standi* to apply for judicial review as a decision had been made by the Minister to reject its written request for access and disclosure of the agreement and the Audit Report. It is nevertheless submitted that the High Court should not have granted the respondents' application for judicial review at the end
D of the substantive hearing on the merits of the application, as they had not shown that that their legal rights or interests had been adversely affected by the Minister's decision: see *Tan Sri Othman Saat,* and *Lim Kit Siang, supra*. The other respondents however did not make a similar request to the Minister and they
E could not claim that they were adversely affected by the Minister's decision.

[55] There is no doubt in my mind that MTUC has satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC as it
F is adversely affected by the decision of the Minister who had rejected its request for the public disclosure of the agreement and the Audit Report and for access to them.

[56] The rest of the respondents, however, had not shown that they were 'adversely affected' by the decision of the Minister as
G none of them had made a similar request to him for the disclosure of and access to the agreement and the Audit Report. They had not, therefore, in my judgment, satisfied the test of threshold *locus standi* under O. 53 r. 2(4) of the RHC and whatever reliefs granted by the High Court must therefore be set aside.

H

[57] An applicant who had passed the test of threshold *locus standi* may not necessarily succeed when the issue of *locus standi* is considered on its merit. In *Tan Sri Othman Saat*'s case Abdoolcader J said,

I

> When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines

> we have indicated, do not merit it, perhaps because, *inter alia*, others are more directly affected, or the plaintiff himself is fundamentally not.

[58] While the threshold test of *locus standi* under O. 53 r. 2(4) of the RHC is different from that under O. 53 r. 3(7) of the SCR 1977, (which came into force on 11 January 1978), the procedural steps in determining the issue of *locus standi* are, in my view no different from that under the English rules. These procedural steps may still be of assistance in arriving at the final decision as to whether or not an applicant may succeed in his application for judicial review. Lord Diplock in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 explained the procedure under O. 53 r. 3(7) SCR thus:

> The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or "threshold", stage is regulated by rule 3. The application for leave to apply for judicial review is made initially *ex parte*, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether "it considers that the applicant has a sufficient interest in the matter to which the"application relates". So this is a "threshold" question in the sense that the court must direct its mind to it and form a *prima facie* view about it upon the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.

[59] Lord Wilberforce, in the *National Federation* case explained the procedure in this way. At the first stage, there may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all or no sufficient interest to support the application. In these cases it would be quite correct to refuse him leave to apply.

[60] But in other cases this will not be so. In these it is necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words the question of

A sufficient interest cannot in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context.

[61] Briefly the facts in the *National Federation* case are these. B The *National Federation*, representing the self-employed and small business, sought a declaration and an order of *mandamus* against the Inland Revenue Commissioners ("the IRC") to assess and collect arrears of income tax said to be due by a substantial number of casual workers who work for newspapers in Fleet C Street. They were not happy that the IRC had entered into an arrangement with the employer and unions of these casual workers wherein the IRC would not investigate in tax lost in certain previous years if future tax could either be deducted at source or be properly assessed. The *National Federation* asserted that the IRC D acted unlawfully in not pursing the claim for full amount of tax due. It claimed that the IRC had exceeded its powers in granting its amnesty.

[62] The Divisional Court granted leave *ex parte* but at the E hearing *inter parte*, on Inland Revenue's objection, the Divisional Court held that the Federation had not 'sufficient interest' under O. 53 r. 3(5) of the Supreme Court Rules. On appeal by the *National Federation* the Court of Appeal (by a majority) allowed the appeal and dismissed the Inland Revenue's objection. On further F appeal by the Inland Revenue, the House of Lords allowed the appeal and dismissed the application for judicial review. Lord Wilberforce held that as a matter of principle one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-G assessed or over assessed. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.

[63] The procedural steps referred to in *National Federation* case was followed by this court in *QSR Brands Bhd v. Suruhanjaya* H *Sekuriti & Anor* [2006] 2 CLJ 532 which stated that at the substantive *locus standi* the court has to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour.

I **[64]** In *R v. Monopolies and Mergers Commission Exp Argyll Group Plc* [1986] 1 WLR 763 Lord Donaldson summarised the relationship between standing at leave stage and at the substantive hearing as follows. At the leave stage an application should be

refused only where the applicant has no interest whatsoever and is a mere meddlesome busybody. Where, however, the application appears to be arguable and there is no other discretionary bar such as dilatoriness, the applicant should be given leave and standing then be reconsidered as a matter of discretion at the substantive hearing. At this stage the strength of the applicant's interest will be one of the factors to be weighed in the balance.

[65] The underlying reason that leave is required for judicial review is to safeguard against the court being flooded and public bodies harassed by irresponsible applications. It is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. (See Lord Diplock in *National Federation* at pp. 642-643).

[66] Now consider the basis of the respondents' application for judicial review (which were referred to earlier) and the grounds in granting the said application. MTUC and the other respondents claim that they and/or the public are entitled to the Concession Agreement and the Audit Report relating thereto on the basis that the government, as a fiduciary, is under a responsibility to provide safe and affordable treated water, water being an inalienable and basic right to human existence and living; that there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised; and that they have a legitimate expectation that the government shall at all times ensure that its people has affordable access to treated water.

[67] The High Court granted the declaration on the ground, *inter alia*, that the Concession Agreement was executed with public interest in mind and that it is not detrimental to national security.

[68] In my view MTUC had not shown that it comes within any of the categories referred to by the Federal Court in *Tan Sri Othman Saat*'s case. For instance, MTUC had not shown that it has a statutory right to the Concession Agreement and the Audit Report or a breach of a statute which affects its interest substantially or that it has some genuine interest in having its legal position declared.

[69] This is not a case where MTUC or its members had been denied outright access to treated water in breach of its alleged fundamental right.

[70] This is a case where MTUC claims that the government, as a fiduciary, is under the duty to provide treated water at affordable tariffs and to ensure that the supply of treated water would not lead to unreasonable profiteering though arbitrary increase of water tariffs or means which are not transparent to the public. Lest it be misunderstood, let me make in clear that I am not passing judgment on the wisdom of privatising the supply and distribution of treated water or what should be the water tariffs. But looking at the evidence as a whole, I am unable to see that the Minister or the government had acted unlawfully or in breach of MTUC's legal right when it denied MTUC access to the Concession Agreement and the Audit Report. Thus, the High Court erred in granting the declaration to MTUC.

Certiorari

[71] *Certiorari* is a discretionary remedy for the control of an administrative action. The celebrated case on the scope of *certiorari* is *R v. Electricity Commissioners Exp London Electricity Joint Committee Co.* [1920] Ltd [1924] 1 KB 171, 205. Lord Atkin L.J in that case said:

> Whenever anybody of persons having legal authority to determine questions affecting the right of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

[72] The scope of *certiorari* had since then been further extended. In *Rex v. Northumberland Compensation Appeal Tribunal Exparte Shaw* [1967] 2 All ER 986 CA, [1969] 1 All ER 208 H.L it was held that the power to quash by an order of *certiorari* a decision of any body of persons having legal authority to determine questions affecting the rights of subject, was not only on the ground that it had acted outside its jurisdiction but also on the ground that there was an error of law apparent on the face of the record.

[73] Lord Diplock in *O'reilly v. Mackman* [1983] 2 AC 237 concurred with Lord Reid's judgment in *Ridge v. Baldwin* [1964] AC 40 that *certiorari* is not only limited to the decisions of any body of persons who had acted judicially in excess of their legal

authority. The remedy of *certiorari* is now available to quash the decisions of any person or body of persons having legal authority on the grounds of error of law or breach of the rules of natural justice.

[74] For the purposes of this appeal, it is not necessary to discuss at length the circumstances in which *certiorari* may be granted as they may not be applicable to the facts before us. They have been discussed in numerous cases by our courts. See for instance *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 LNS 96, *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1980] 1 LNS 71, *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

[75] *De Smith's Judicial Review*, 6th edn, at p. 792 contains this concise statement: A person aggrieved ie, one whose legal rights had been infringed or who had any other substantial interest in impugning an order, might be awarded a *certiorari ex debito justitiae* if he could establish any of the recognised grounds for quashing; but the court retained a discretion to refuse his application if his conduct was such as to disentitle him to relief. Only in highly exceptional circumstances did the court exercise its discretion in favour of an applicant who was not a person aggrieved: (*R v. Thames Magistrates' Court Exp Greenbaum* [1957] 55 LGR 129, *R v. Stafford JJ Exp Stafford Corp* [1940] 2 KB. 33 at 43-44).

[76] On the available evidence, it had not been shown that the Minister had acted in excess of his authority in rejecting MTUC's application for the Concession Agreement and the Audit Report. Neither did MTUC established that its legal right had been infringed. Thus the High Court erred in granting the order of *certiorari* to MTUC without determining whether or not MTUC had any legal right to the Concession Agreement and the Audit Report; or that the Minister had acted in breach of MTUC's legal right in denying access to those documents.

Mandamus

[77] The court's discretionary power to make an order of *mandamus* is governed by s. 44 of the Specific Relief Act 1950, subject of course to the proviso that the application satisfy the conditions specified in paras. (a) to (e), namely:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the "case may be, of the said specific act;

A (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

B (c) in the opinion of the judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

C (e) the remedy given by the order applied for will be complete.

There was no finding by the High Court that there was an infringement of MTUC's right by reason of the Minister's decision rejecting its application.

D **[78]** Section 45 of the Specific Relief Act 1950 further provides that the application for an order requiring any specific act to be done or forborne by any person holding a public office, must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof. Upon scrutinizing the affidavits in support of MTUC's application I am unable to conclude that the deponent of the said affidavits had complied with s. 45 of the Specific Relief Act 1950. The legal effect of non-compliance with ss. 44 and 45 of the Specific Relief Act 1950 means that the granting of the order of *mandamus* was bad in law and made without any clear legal basis.

E

F

Confidentiality

[79] The issue here is whether the Concession Agreement and the Audit Report are protected under the Official Secrets Act 1972. The reason given by the Minister in refusing MTUC's request for the Concession Agreement and the Audit Report is that these documents are SULIT and RAHSIA.

G

H **[80]** Japar bin Abu, who affirmed the affidavit on behalf of the Minister categorically states in paras. 5 and 7 of his affidavit that the Concession Agreement and the Audit Report are classified as 'SULIT' AND 'RAHSIA' and that they had been tabled before the cabinet:

I 5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan

sebagai "SULIT" berasaskan Klausa 45 Perjanjian Konsesi dimana perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada perjanjian tersebut.

7. Saya menegaskan di sini bahawa Laporan Audit adalah dokumen berperingkat yang dikategorikan sebagai "RAHSIA" kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam Mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, dokumen tersebut merupakan dokumen peringkat "RAHSIA" di bawah Jadual kepada seksyen 2A Akta Rahsia Rasmi, 1972.

[81] The term 'official secret' is defined in s. 2(1) of the Official Secrets Act 1972 ("OSA") as "any document specified in the schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s. 2B".

[82] Wrongful communication of any official secret is an offence under s. 8 of the OSA.

[83] The documents listed in the schedule include, among others, "cabinet documents, records of decision and deliberations including those of cabinet committee". The averment in Japar bin Abu's affidavit that the Concession Agreement and the Audit Report are classified as 'SULIT' and 'RAHSIA' is not seriously challenged. These documents remain as classified document until they are declassified under s. 2C or deleted under s. 2A of the OSA: *See Kok Kol v. Chong Kui Seng & Ors & Another Appeal* [2010] 2 CLJ 481.

[84] The contention that these documents are not detrimental to national security or public interest is irrelevant in determining whether or not they are classified as official secret. Thus, in my view, the respondents' assertion that they had a legitimate expectation to those documents cannot be sustained to defeat an express provision in the OSA which prohibits wrongful or unauthorised communication of any official secret. The facts in *Takong Tabari (Suing In Her Personal Capacity And As The Administratrix Of The Estate Of Jeffrey Satuk Gabar-Deceased) v.*

Government of Sarawak & Ors [1995] 1 CLJ 403 are different. The issue in that case centered on admissibility of a report, namely, 'Department Board of Inquiry Report', certified under s. 16A of the OSA as an official secret, which the plaintiff sought to admit in support of her claim against the defendants, arising from the death of her husband in an explosion which occurred in the premises occupied by the fourth defendant. The High Court in that case held that nothing was done to show that the report relate to 'affairs of state' or that it had a prejudicial effect on public interest.

[85] By contrast, Japar bin Abu, in his para. 8 of his affidavit dated 30 June 2010, filed in support of the appellant application for stay of the High Court order pending appeal, affirmed that disclosure of the said documents would have a prejudicial effect on public interest and on the administration of the government.

[86] In my judgment and for the reasons as aforesaid, the respondents had not, at the substantive hearing on the issue of *locus standi*, when all the evidence from both sides were available before the High Court, shown that they were entitled to the Concession Agreement and the Audit Report. It follows that the appellants' appeal should be allowed with costs here and below, which I so order, and that the orders of the learned JC be set aside.

Hishamudin Mohd Yunus JCA (dissenting):

[87] This is an appeal by the appellants against the decision of the High Court of Kuala Lumpur (appellate and Special Powers Division) of 28 June 2010. By way of judicial review, Hadhariah Syed Ismail JC had granted the respondents the following orders prayed for in their judicial review application before the learned Judicial Commissioner:

(1) that a writ of certiorari to issue to quash the decision of the first appellant (the Minister of Energy, Water and Communication) (hereinafter shall be referred to as 'the Minister') refusing to publish and/or disclose an Audit Report and a Concession Agreement; and

(2) that a writ of *mandamus* to issue to compel the Minister to publish and/or disclose the Audit Report and the Concession Agreement to the respondents and/or to the public within seven days of the order.

[88] The essence of the judicial review application is that despite repeated requests by the first respondent, the Malaysian Trade Union Congress ('the MTUC'), the first appellant, that is, the Minister, failed to disclose the following documents despite being obliged in law to do so:

(1) an agreement ('the Concession Agreement') of 15 December 2004 between:

(a) the Government of the State of Selangor (cited as the second respondent in the High Court proceedings, but is not a party in this appeal);

(b) the Federal Government (the second appellant in this appeal); and

(c) a company known as Syarikat Bekalan Air Selangor Sdn Bhd (also known by the acronym 'SYABAS' – but not a party either in the proceedings below or in this appeal); and

(2) an Audit Report justifying an increase of 15% in water tariffs ('the Audit Report').

[89] Although the Concession Agreement is a very important document for the public, since the contents of which affect the lives and basic needs (access to treated water) of people living in the State of Selangor, yet, rather strangely, this Concession Agreement was not permitted by the parties to it to be made available for public disclosure. Instead, there is a peculiar clause - cl. 45 - in the Concession Agreement that states that the Concession Agreement may be disclosed to a third party only with the agreement of all the three parties to the agreement. The learned Senior Federal Counsel, Datin Azizah, appearing for the appellants, when asked by this court, said that she did not know the rational for such a clause.

[90] Prior to this Concession Agreement, the Selangor State Government determined the water tariffs within the State of Selangor.

[91] Historically, until 15 March 2002, the Selangor Water Supply Department had been responsible for the distribution and treatment of water for the State of Selangor. On 15 March 2002, however, these services were privatized: the distribution and

A treatment components were separated with the non-profitable distribution aspect being taken over by Perbadanan Urus Air Selangor Bhd (PUAS). The profitable treatment aspect was taken over by a consortium comprising Puncak Niaga (M) Sdn Bhd ('Puncak Niaga'), Konsortium Abass Sdn Bhd and Syarikat
B Pengeluar Sdn Bhd ('SPLASH').

[92] PUAS suffered a loss of about RM2 billion and was unable to meet its commitments. The Government of the State of Selangor asked for financial aid from the Federal Government, but
C that request was rejected.

[93] However, in September 2004 it was announced that SYABAS would take over PUAS and the Federal Government would provide financial assistance of RM2.9 billion to SYABAS. At this juncture, Puncak Niaga held 70% interest in SYABAS,
D whilst Kumpulan Darul Ehsan Berhad, a company owned by the Selangor Economic Development Corporation, held the remaining 30%.

[94] With the execution of the 'confidential' Concession
E Agreement in December 2004, the water tariffs are now governed by the terms of the said agreement. Under the Concession Agreement, SYABAS is entitled to increase the water tariffs only if it has fulfilled the performance indicators prescribed by a formula, in particular, if it has managed to achieve at least a 5% reduction
F in the Non Revenue Water (NRW), that is to say, to reduce the percentage of NRW to 37.78%.

[95] It is significant to note, however, that, earlier, on 19 April 2004, the Minister in a press statement had assured that any
G application by SYABAS to review tariffs would have to be considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that any suggestion to increase water tariffs would have to go
H through an evaluation exercise that would be strict and transparent, and with due regard being had to the views of the various stakeholders, including the consumers.

[96] But the truth was that there had been no meaningful
I discussion with the various stakeholders (including consumers) as had been assured by the Minister.

[97] Despite the secrecy of the Concession Agreement, parts of it, however, through discussions in the mass media, came to the knowledge of the public. The parts that came to public knowledge relate to NRW, the formulation of water tariffs, and provisions on profits. In particular, a research paper by one Kim Eng published on 25 April 2005 states:

(a) that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out performance indicators;

(b) that these performance indicators included a reduction of NRW; and

(c) that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

[98] In April 2005, reports surfaced which stated that SYABAS was entitled to the 1 January 2006 review. However, as at 1 January 2006, SYABAS did not get the review;

[99] In October 2006, it was declared by the Minister that the water tariffs were reviewed and increased by 15%. This was supposedly on the basis of the performance indicators having been achieved including the NRW component.

[100] The respondents contend that the basis of the review is questionable as:

(a) although an audit was reported to have been conducted in 2005, yet a review was not given on 1 January 2006;

(b) SYABAS does not appear to have prepared a report setting out what concrete efforts were taken to achieve the NRW reduction of 5% for the year 2005;

(c) media reports state that the NRW reduction programme was stopped by a court order in or about August 2005; and

(d) reports are contradictory about the entitlement of SYABAS to an increase of tariffs.

[101] Be that as it may, it was subsequently revealed that an Audit Report was in fact produced to cabinet and that Audit Report confirmed that SYABAS had achieved the 5% reduction in NRW and thus entitled to an increase in water tariff with effect from 1 November 2006.

[102] On 7 November 2006, Mr Rajasekaran, the Secretary General of the Malaysian Trade Union Congress (the first respondent, MTUC), on behalf of MTUC, wrote to the Minister, the first appellant, seeking the latter to make public the Audit Report and the Concession Agreement before 16 November 2006. The letter reads:

KONGRES KESATUAN SEKERJA MALAYSIA
Malaysian Trade Union Congress

MTUC/2307 MTUC
7hb November 2006 PEJUANG KAUM PEKERJA
SEJAK 1949

YB Datuk Seri Dr Lim Keng Yaik
Menteri Tenaga, Air dan Komunikasi
Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr Lim Keng Yaik

Merujuk kepada kenyataan akhbar YB Datuk mengumumkan kenaikan 15 peratus tariff air dan bayaran pampasan RM152 juta kepada Syabas.

Atas dasar keterbukaan, kami memohon agar YB mempublisitikan laporan Umum Auditor bersama dengan perjanjian sepakat di antara Kerajaan Persekutuan dan Kerajaan Negeri Selangor bersama Syabas. Kami amat sukacita sekiranya laporan tersebut disebarkan kepada pengetahuan umum sebelum 16 November 2006.

Kami rela untuk mengambil laporan tersebut dari pejabat YB sekiranya diizinkan.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

tt.

(G RAJASEKARAN)
Setiausaha Agung

Salinan: YAB Perdana Menteri
En Teo Yen Hua, Ketua Setiausaha Dua

[103] There was no reply by the Minister to this letter.

[104] So, on 23 November 2006 Mr. Rajasekaran, on behalf of MTUC, again wrote to the Minister seeking disclosure of the two documents. This reminder letter reads:

KONGRES KESATUAN SEKERJA MALAYSIA
Malaysian Trade Union Congress

MTUC/2307

MTUC
PEJUANG KAUM PEKERJA
SEJAK 1949

23hb November 2006

YB Datuk Seri Dr Lim Keng Yaik
Menteri Tenaga, Air dan Komunikasi
Putrajaya

Faks: 03 88893712

YB Datuk Seri Dr Lim Keng Yaik

PER: MTUC Mengulangi Permintaan Sesalinan Laporan Audit Air dan Perjanjian Sepakat

Merujuk kepada surat kami bertarikh 7 November 2006, MTUC tidak menerima sebarang maklumbalas dari Menteri sehingga ke hari ini.

Kami mengajukan sekali lagi permintaan tersebut, iaitu mendapatkan Laporan Audit Jabatan Air Kebangsaan dalam tempoh masa tujuh hari. Laporan tersebut akan mendalamkan pengetahuan kami mengenai kerasionalan kenaikan tariff air. Atas dasar keterbukaan dan pemerintahan yang bersepadu kami sangat berharap agar Menteri akan bersetuju dengan permintaan ini.

Memandangkan kenaikan tariff air berkait rapat dengan perjanjian sepakat di antara Kerajaan Persekutuan, Kerajaan Selangor dan Syabas kami berharap agar salinan perjanjian tersebut diberikan kepada kami.

Sekiranya kami tidak menerima sebarang maklum balas dalam tempoh masa tujuh hari dari Menteri Tenaga, Air dan Komunikasi, maka kami akan menganggap Menteri tidak berminat untuk memberi maklum balas terhadap permintaan kami.

Kerjasama pihak YB dalam perkara ini amat kami hargai.

Sekian terima kasih.

Yang benar,

tt
(G RAJASEKARAN)
Setiausaha Agung

Salinan: YAB Perdana Menteri
En Teo Yen Hua, Ketua Setiausaha Dua

[105] On 4 December 2006 the Minister replied to the MTUC's letter. The Minister stated in his letter that the Audit Report and the Concession Agreement were 'not appropriate' ('tidak sesuai') to be disclosed to the public. The Minister gave a reason for the stand that he took: that the two documents had been categorized as 'CONFIDENTIAL and SECRET'. The Minister's letter reads:

PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
62668 PUTRAJAYA

Telefon: 603-8883 6000
Faks: 603-8889 1335

Ruj. Kami: KTAK: BF A (S) 22/12/1 Klt.2 (26)

Tarikh: 4 Disember 2006

SEGERA DENGAN FAKS: 03-8024 3224

En G Rajasekaran
Setiausaha Agung
Kongres Kesatuan Sekerja Malaysia (MTUC)
Wisma MTUC
10-5, Jalan USJ 9/5T
47620 SUBANG JAYA

Tuan,

Penyelarasan Kadar Tarif Air Oleh Syabas

Dengan hormatnya saya diarah menarik perhatian tuan kepada perkara di atas dan surat tuan bertarikh 7 November 2006 adalah berkaitan.

2. Untuk makluman pihak tuan, Kementerian ini berpendapat bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS serta Laporan Audit tidak sesuai untuk didedahkan kepada umum memandangkan dokumen berkenaan adalah dokumen berperingkat yang dikategorikan sebagai 'SULIT DAN RAHSIA' kerajaan.

3. Walau bagaimanapun, keputusan Laporan Audit tersebut telah dibentangkan kepada Jemaah Menteri dan telah dipersetujui. Laporan audit tersebut juga telah mengesahkan bahawa SYABAS telah berjaya mencapai sasaran pengurangan NRW sebanyak 5% yang telah ditetapkan dan mereka layak untuk menikmati kenaikan tariff yang berkuat kuasa mulai 1 November 2006.

4. Kerjasama pihak tuan amatlah dihargai dan didahului dengan ucapan terima kasih.

Sekian.

"Berkhidmat Untuk Negara"

Saya yang menurut perintah,

tt.

(JAPAR ABU)
bp. Ketua Setiausaha
Kementerian Tenaga, Air dan Komunikasi Malaysia

Edaran Dalaman
KSU
TKSU II
KP JBA

[106] It is to be observed that it is not the Minister's position that he is under no obligation to disclose the two documents. His reason for his refusal to accede to the MTUC's request is merely because of the 'SULIT/RAHSIA' status of the documents.

[107] But it is also to be noted that the Minister's letter does not explain as to why the two documents had to be 'categorized' ('dikategorikan') as 'SULIT/RAHSIA'. The letter does not say that disclosure of the two documents would be detrimental to public interest or security. Significantly the letter makes no mention of either the Official Secrets Act 1972 (OSA) or cl. 45 of the Concession Agreement.

[108] It is further to be noted that the Minister's letter also discloses that an Audit Report had been tabled before the cabinet and had been accepted by the cabinet. The letter also states that

A the Audit Report had confirmed that SYABAS had successfully achieved the target of reducing NRW by 5% and hence was eligible to an increase in tariffs with effect from 1 November 2006.

[109] MTUC as well as the other respondents felt aggrieved by
B the Minister's response.

[110] The respondents' application for judicial review was filed on 15 January 2007.

[111] In the proceedings before the High Court, the State
C Government of Selangor (the second respondent in the judicial review proceedings before the High Court) informed the court (through the written submission of the State Legal Adviser) that it had no objection to the disclosure of the Concession Agreement to the applicants (the respondents in this appeal).

D

[112] SYABAS too, in the course of the proceedings before the High Court, had, *vide* its letter of 14 April 2010 addressed to the applicants' solicitors (the applicants there are the respondents in this appeal), also categorically stated that it had no objection to
E the disclosure of the Concession Agreement to the applicants.

[113] In this judgment I shall primarily confine myself to the five issues raised in the memorandum of appeal, namely,:

(1) that the learned Judicial Commissioner erred in concluding
F that the respondents have *locus standi* to commence the judicial review application;

(2) that the learned Judicial Commissioner erred in failing to hold that one of the documents, the Audit Report is an
G official secret document protected by s. 2A of the Official Secrets Act, 1972;

(3) that the learned Judicial Commissioner erred in holding that the 1st appellant failed to take into consideration the
H legitimate expectation of the respondents as affected parties;

(4) that the learned Judicial Commissioner erred in failing to take into account the express provision of the Concession Agreement that it must remain confidential;

I

(5) that the learned Judicial Commissioner erred in her finding that that the documents contained no information that could be detrimental to public interest or safety.

The Issue Of *Locus Standi*

[114] Under O. 53 r. 2(4) of the Rules of the High Court 1980, the respondents/applicants must establish that they have been adversely affected by the decision of the Minister not to make public the Concession Agreement and the Audit Report.

[115] In my judgment, the respondents are adversely affected by the refusal of the Minister to disclose the contents of the Concession Agreement and the Audit Report.

[116] First, water is a basic necessity of life and, therefore, access to treated water is a basic human right. If a citizen has to pay in order to have treated water, the cost to him ought to be minimal and affordable.

[117] Second, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. They do not have alternative access to treated water in Selangor. This is because SYABAS has a monopoly over distribution of treated water in Selangor. Any increase in tariffs would have an adverse impact on their lives as consumers of a basic commodity.

[118] Third, the increase in water tariffs is triggered by the Concession Agreement and the Audit Report. Hence the respondents, as the consumers, should be entitled to know whether the Concession Agreement and the Audit Report justify the increase in tariffs. With the full knowledge as to what the Concession Agreement provides and what the Audit Report says, they would be in a position to form an opinion based on facts and to make an appropriate representation to SYABAS and to the Governments (the Selangor State Government and the Federal Government), if need be, pertaining to the increase in the tariffs.

[119] Fourth, the *locus standi* threshold for judicial review actions is lower than in private law actions. In *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal said (at pp. 541-542):

> [15] By contrast, *certiorari* and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold locus standi test to be met. Hence, Lord Wilberforce said in *Gouriet v. Union of Post Office Workers* [1978] AC 435 that in applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants "liberal access under a generous conception of *locus standi*."

A [16] It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold *locus standi* for all the remedies' that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v. Canada* [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is to tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich AIR* [1999] SC 3211, where, when granting leave, it was said:

> [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realization of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[120] Fifth, the second to the twelfth respondents are citizens of Malaysia and water users in the Concession Area. They stand in a fiduciary relationship with the Government of Malaysia (*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169).

By reason of this fiduciary relationship it is the duty of the Federal Government to ensure that the provision of treated water is adequately regulated to ensure meaningful access, and ensuring that profiteering does not occur from water provision services. This duty, particularly, the duty to protect consumers, imposed on the Federal Government, is further entrenched by the Water Services Industry Act 2006. I shall say more of this fiduciary relationship principle later.

[121] Sixth, the 13th and 14th respondents sue as children (by their next friends). They reside with their parents within the concession area. They too are consumers of treated water and, as children, are further protected by law, in particular, the Child Act 2001 which decrees that paramount consideration be given to their interest and welfare.

[122] Finally, the first respondent, MTUC, is a society and a federation of trade unions. It represents workers' interests. It is the oldest national center representing Malaysian workers and has approximately 500,000. Its headquarters is located in Subang Jaya, Selangor. It had written two letters to the Minister seeking disclosure of the Concession Agreement and the Audit Report, and whose request had been refused by the latter. Although the Minister had refused the request, the Minister had never treated the first respondent as a mere busybody. The Minister in his reply had never taken the position that *per se* the first respondent had no right to have sight of the two documents sought; or that he is under no duty to make public disclosure of those documents. The Minister had merely taken the position it was in no position to disclose the documents by reason of their 'confidential' status. The relevant Ministry's officer, Encik Japar, in his affidavit, also takes a similar position.

Whether The Audit Report Is Protected By The Official Secrets Act 1972 ('The OSA')

[123] In my judgment, the Audit Report is not protected by the OSA. There is no evidence that prior to its being produced before the cabinet the Audit Report had been classified as official secret under the OSA. Indeed the affidavit of Encik Japar bin Abu, the Division Secretary of the Water Services Division of the Ministry in question merely states:

> 7. Saya menegaskan di sini bahawa Laporan Audit adalah Dokumen berperingkat yang dikategorikan sebagai 'RAHSIA' Kerajaan dan tidak boleh didedahkan kepada umum. Ini adalah

A Berdasarkan fakta bahawa Laporan Audit telah dibentangkan dan diputuskan dalam mesyuarat Jemaah Menteri yang bersidang pada 11.10.2006. Justeru itu, Dokumen tersebut merupakan Dokumen peringkat 'Rahsia' di bawah Jadual seksyen 2A Akta Rahsia Rasmi 1972.

B **[124]** 'Official secret' is defined by s. 2 of the OSA as:

'official secret' means any document specified in the schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential', or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of s State or such public officer appointed under section 2B.

C

[125] Section 2A of the OSA states:

D

Addition, deletion or amendment of the schedule

2A. The Minister may, from time to time, by order published in the Gazette, add to, delete from, or amend any of the provisions of the schedule hereto.

E

[126] Strictly, this s. 2A is irrelevant and should not have been referred to by Encik Japar. However, the schedule provides:

SCHEDULE

F [Section 2A]

Cabinet documents, records of decisions and deliberations including those of Cabinet committees;

[127] It is to be observed that the term 'Cabinet documents' G appears in the above schedule. Is the Audit Report a 'Cabinet document'? The OSA, however, does not define the term 'Cabinet documents'.

[128] With respect, I do not think that the Audit Report could H legally be said to be a Cabinet document. With respect, the above officer (Encik Japar) has misunderstood the schedule to the OSA or rather had adopted a literal interpretation of the term 'Cabinet document'. His interpretation of the schedule to the OSA is that a non official secret document would automatically become an I official secret document the moment it is produced before the

cabinet. This is a misconception. In this regard, it must be appreciated that, first, the Audit Report, before the cabinet meeting (Encik Japar, in his affidavit, discloses that the cabinet meeting in question was held on 11 October 2006), was already in existence independently of any cabinet paper, and had never been classified as an official secret prior to it being produced before the cabinet. There is much force in Encik Malik Imtiaz's argument that it would be nonsensical for any document of any nature that was put before the cabinet to immediately/automatically become an official secret. Such an interpretation would be perverse as any document that the cabinet happened to consider would ipso facto become a 'state secret' instantly, despite the same never being labelled as such prior to the cabinet meeting.

[129] Second, Encik Japar, in his affidavit, never states that the cabinet had made a decision declaring the Audit Report to be an official secret under the OSA.

[130] Third, Encik Japar, in his affidavit, never says that the Audit Report was prepared solely for the purpose of making it part of a cabinet paper; and, fourth, Encik Japar did not explain why the Audit Report must be classified as 'official secret' (apart from merely stating the fact that the Audit Report had been tabled before the cabinet and invoking the schedule to the OSA). Indeed, he never states in his affidavit that the disclosure of the Audit Report would be detrimental to the national security or public interest.

[131] Now, s. 17A of the Interpretation Acts 1948 and 1967 requires that legislation be construed purposively:

> Regard to be had to the purpose of Act
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[132] In *Takong Tabari (Suing In Her Personal Capacity And As The Administratrix Of The Estate Of Jeffrey Satuk Gabar-Deceased) v. Government of Sarawak & 3 Ors* [1995] 1 CLJ 403 Richard Malanjum J (as he then was) explained the purpose of the OSA:

> In my view the [Official Secrets] Act deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is

A intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest.

B **[133]** In my judgment, in order to qualify as a 'cabinet document' for the purpose of the schedule, the Audit Report must have been prepared solely for the purpose of making it part and parcel of a cabinet paper, and it is not the case here. The Audit Report was already in existence before the cabinet paper was prepared.

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[134] In any case, even assuming for a moment that the Audit Report is a cabinet document, in my judgment, on the authority of *Takong Tabari*, in order to qualify as an official secret under the OSA, it must be proven that disclosure of the Audit Report is D detrimental to national security or public interest. Again it is not the case here. The Audit Report had been examined by the learned Judicial Commissioner during the proceedings before her and she has made this pertinent observation:

E Having read the Audit Report myself, I had this to say. The report contains information relevant to the Concession Agreement, in particular to the increase in water tariff. But, I was of the view that the report did not contain information detrimental to the national security or public interest. As with the Concession Agreement, here also I could foresee there will be public F discussion and criticism against the government.

The Legitimate Expectation Issue

[135] The appellants appear to contest the following statement made by the learned Judicial Commissioner:

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To sum up, the 1st respondent's refusal to disclose the Concession Agreement and the Audit Report was made without taking into consideration the legitimate expectation of a member of the public who is affected in the decision making process to be treated fairly.

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[136] There is a legitimate expectation here on the part of the respondents on the following grounds. First, treated water is a basic necessity of life and right to treated water is a basic human right.

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[137] Second, as I have said earlier when dealing with the issue of *locus standi*, the respondents are residents of Selangor and, therefore, are consumers of treated water in the State of Selangor. By reason of the monopolistic position of SYABAS, they do not have alternative access to treated water in Selangor. Any increase in tariff would have an adverse impact on their lives as consumers of a basic commodity.

[138] Third, earlier, on 19 April 2004, the Minister in a press statement had assured that any application by SYABAS to review tariffs would have to be considered from the context of results, capital expenditure and operational costs and from the context of successful reduction of NRW and distribution costs. The Minister had further assured that any suggestion to increase water tariffs would have to go through an evaluation exercise that would be strict and transparent, and with due regard being had to the views of the various stakeholders, including the consumers. But what had really happened after the assurance was that, in breach of the assurance, there had been no meaningful discussion between the Minister/Federal Government and the stakeholders (including consumers).

[139] Fourth, as has been pointed out in the early part of this judgment, despite the secrecy of the Concession Agreement, parts of it, somehow, had surfaced and had come to public knowledge. It is now known to the public that water tariffs would be reviewed on 1 January 2006, and would be reviewed every three years thereafter, and that in the event of non-review within 90 days of a milestone, SYABAS would be entitled to compensation. The quantum of review would be based on a formula which set out the performance indicators. These performance indicators include a reduction of NRW; and that the Federal Government would be paying compensation to SYABAS if tariffs were not reviewed on 1 January 2006.

[140] Now, as a matter of law, a legitimate expectation arises when there is a clear and unambiguous representation made by a public authority, and in the present case, by a Minister. The principle of substantive legitimate expectation is rooted in the concept of fairness, and by this principle the Minister is required to give effect to the representation that he had made earlier to the public earlier.

[141] In *Food Corpn. Of India v. Kamdhenu Cattle Feed Industries* [1993] AIR SC 1601 the Supreme Court of India said:

> There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power as it is unrealistic, but provides for control of its exercise by judicial review.

[142] This principle of legitimate expectation was discussed and applied by our Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65.

[143] In *Shri Dinesh Trivedi, MP & Ors v. Union of India & Ors* [1997] 4 SCC 306 the Supreme Court of India held:

> 16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare.

[144] At a later part of its judgment, at para. 18, the court went on to hold:

> 18. The case of *S. P. Gupta v. Union of India* decided by a seven-Judge Constitution Bench of this court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the judges was that in regard to the functioning of Government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

Clause 45 Of The Concession Agreement

[145] At the outset it is important to note that, unlike in the case of the Audit Report, the appellants, in refusing to disclose the Concession Agreement, are not relying on the OSA. The appellants are merely relying on a contractual obligation to the other parties to the agreement, namely, the Selangor State Government and SYABAS, by reason of clause of 45 of the Concession Agreement. In this regard, I refer to para. 5 of Encik Japar's affidavit. It states:

> 5. Saya menegaskan di sini bahawa Perjanjian Konsesi di antara Kerajaan Persekutuan, Kerajaan Negeri Selangor dan pihak SYABAS adalah dokumen berperingkat yang dikategorikan sebagai "SULIT" berasaskan Klausa 45 Perjanjian Konsesi di mana Perjanjian tersebut hanya boleh didedahkan kepada pihak ketiga dengan persetujuan semua pihak kepada Perjanjian tersebut.

[146] The appellant's position is that the contractual obligation of confidentiality is paramount and takes precedence.

[147] With respect, I think that the Minister's (Government of Malaysia's) contractual obligation (by reason of cl. 45) to the Selangor State Government and SYABAS can no longer be a used as a basis of the Minister's refusal for the disclosure of the Concession Agreement. For at the beginning of this judgment it has already been pointed out that both the Selangor State Government and SYABAS (the only parties to the Concession Agreement, besides the Government of Malaysia) are already prepared to disclose the Concession Agreement to the applicants. The learned Judicial Commissioner in her judgment said:

> The Concession Agreement is a tripartite agreement. It was revealed in the written submission of the 1st and 3rd respondents that clause 45 of the said agreement restraint disclosure to any third party without prior mutual agreement of the parties unless disclosure is required by law or the rules of any stock exchange. It is also evident from the 2nd respondent's written submission that they have no objection to disclose the concession agreement to the applicants. *Vide* their letter of 14.4.2010 addressed to the applicants' solicitors, SYABAS has categorically stated that they also have no objection to the disclosure of the concession agreement.

[148] The appellants, either in the memorandum of appeal or in their submissions, have never challenged the correctness of the above statement of facts by the learned Judicial Commissioner.

[149] Whilst it is true that the change in position taken by the Selangor State Government and SYABAS was only after the date of the Minister's letter, still, that was a change in position that took place while proceedings before the High Court were still on-going. Therefore, the appellants ought to have conceded before the High Court that cl. 45 of the Concession Agreement, by reason of the change in position of the Selangor State Government and SYABAS, was no longer an issue before the court.

[150] In any case such contractual obligation of non-disclosure (if it still exists) does not stand in the way of judicial consideration of public interest. The appellant's claim to confidentiality must be examined by reference to public interest. Confidentiality would only be upheld if disclosure will be detrimental to public interest. In *The Commonwealth of Australia v. John Fairfax & Sons Ltd* [1980] 147 CLR 39 the High Court of Australia said (at p. 52):

> But it can scarcely be a relevant detriment to the government that publication of material concerning its action will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
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> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
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> The court will not prevent the publication of information which merely throws light on the part workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs.

[151] In the present case, the appellants have not suggested that disclosure of the Concession Agreement would be detrimental to public interest. On the contrary, we have the following pertinent

observation of the learned Judicial Commissioner who had examined the Concession Agreement, and this is what she has said:

> Having read through both the documents, in particular, the Concessions Agreement, I had no doubt that it contains no information detrimental to the national security or public interest. But I could foresee its disclosure may lead to public discussion and criticism against the government.

Findings Of The Judicial Commissioner

[152] The appellants take the position that the learned Judicial Commissioner erred in holding that the documents contained no information that could be detrimental to public interest or safety.

[153] With respect, there is no merit at all in this argument.

[154] In the course of the proceedings, the documents were made available by the appellants to the learned Judicial Commissioner without any objection by the appellants when the learned Judicial Commissioner requested to examine them. As I have pointed out earlier, the learned Judicial Commissioner, having examined both documents, had made a finding that there is nothing in the documents, if disclosed to the appellants or to the public, would be detrimental to public interest or safety.

[155] The appellants on their part have not explained in their affidavits in what way that disclosure of the documents to the respondents or to the public would be detrimental to public interest or safety. It is elementary that he who alleges must prove.

Whether The Minister Is Under A Duty To Disclose The Two Documents

[156] It is the contention of the learned Senior Federal Counsel for the appellants, Datin Azizah, that regardless of the OSA or cl. 45, the Minister is under no legal duty to disclose the documents as there is no statutory provision which obliges the Minister to make such disclosure. Citing s. 44 of the Specific Relief Act, 1950, the learned Senior Federal Counsel argues that, in the absence of such a statutory provision, no order of *mandamus* can be issued against the Minister.

[157] Now with respect, I do not think that that the learned Senior Federal Counsel can raise such an argument as this is not one of the issues raised in the appellants' memorandum of appeal. The learned Senior Federal Counsel should only confine her submission to the five issues raised in the memorandum of appeal.

[158] Moreover, the appellants in their affidavit, and the Minister in his letter to MTUC, had never taken the position that the Minister is under no obligation to disclose the two documents either to the public or to the respondents, in particular, MTUC. The position that the appellants had taken all along was merely that legally they are prevented from disclosing the documents by reason of cl. 45 of the Concession Agreement and the OSA.

[159] In any case, in my judgment the legal duty or obligation is not confined only to legal duties or obligations prescribed by statutes. A court of law has the power to issue an order of *mandamus* pursuant to s. 44 of the SRA to compel any person holding public office (such as a Minister) to carry out a duty if that person by reason of law, written law or otherwise, is under a duty or obligation to do a particular act and has failed to do so. In the present case the Minister is under a legal duty to make disclosure. That legal duty arises by reason of the fact that a fiduciary relationship exists between the Government and the citizens, particular, when it is to be considered that treated water is a basic necessity off life and that access to treated water is a basic human right, that SYABAS enjoys a monopolistic position in relation to consumers of treated water in Selangor; and that under s. 3(1) of the Water Services Industry Act 2006 the 'Federal Government shall have executive authority with respect to all matters relating to water supply systems and water supply services ...'. In the context of this fiduciary relationship it is to be recalled that the Minister had given his assurances that the Government would be strict and transparent in considering any application by SYABAS for any increase in tariff, and would take into account the views of the various stakeholders, including consumers. A similar assurance had been given by the Federal Government in Parliament in the Explanatory Statement when tabling the Water Services Industry Bill (later passed by Parliament as the Water Services Industry Act 2006):

> Objektif polisi nasional bagi industri Perkhidmatan bekalan air dan pembentungan ialah: (a) untuk mewujudkan satu struktur telus dan berintegrasi bagi perkhidmatan bekalan air dan pembentungan yang memberikan Perkhidmatan yang efektif dan efisien kepada

pengguna-pengguna; (b) untuk mengawal kepentingan-kepentingan jangka panjang pengguna-pengguna; (c) untuk mengawal tariff dan memastikan perkhidmatan bekalan yang mampu diperolehi atas dasar saksama; dan (d) untuk mewujudkan satu system kebertanggungjawapan dan tadbiran yang efektif di antara pengendali-pengendali dalam industri perkhidmatan bekalan air dan pembentungan.

[160] In *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, Gopal Sri Ram in delivering the judgment of the Court of Appeal said (at pp. 193-194):

There is nothing startling in the trial judge holding the first and fourth defendants (State Government of Selangor and the Government of Malaysia) to be fiduciaries in public law. In a system of Parliamentary democracy modeled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.

So, in *Premachandra v. Major Montague Jayawickrema* [1994] 2 Sri LR 90, at p. 105, GPS De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said:

> There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. (emphasis added)

In the course of his judgment the learned Chief Justice referred to the following passage extracted from *Administrative Law* by HWR Wade (5th edn):

> Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which

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> Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

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[161] Further, a duty to make disclosure on the part of the appellants to the respondents also arises by reason of the principle of legitimate expectation explained earlier, a principle that has come into play by reason of the public assurances that the Minister had made.

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